



POLICE DEPARTMENT

February 3, 2009

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Darrin Giachetti
Tax Registry 913854
109 Precinct
Disciplinary Case No. 83007/07

The above-named member of the Department appeared before me on September 22, 2008 and October 6, 2008, charged with the following:

1. Said Police Officer Darrin Giachetti, assigned to 109 Precinct, while on-duty, on or about June 24, 2006, at a location known to this Department, within the confines of Queens County, did use excessive force against an individual known to this Department, to wit: repeatedly striking said individual about the body and/or head without just cause.

PG 203-11 -- Page 1, Paragraph B—FORCE

The Department was represented by Daniel Maurer, Esq., Department Advocate's Office, and the Respondent was represented by Craig Hayes, Esq.

The Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

The Respondent is found Not Guilty.

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SUMMARY OF EVIDENCE PRESENTEDThe Department's Case

The Department called Sergeant Nelson Villafane and Johnathan Leavy as witnesses. The Department offered into evidence a copy of an arrest report from the Omniform¹ system as Department's Exhibit ("DX") 1, a copy of a complaint report from the Omniform system, (DX 2), two photos of Daniel Sullivan, (DX 3 and 4), and a copy of a pre-hospital care report ("PCR") prepared by Emergency Medical Technician Johnathan Leavy (DX 5.). DX 3 depicts Sullivan from a right, profile view. He has bruises on the right portion of his head near his hair line. He also has stitches under his right eyebrow with some black and blue discoloration around the right eye, along with scrapes and scratches on his face and neck area. Sullivan has red bruising on his lip. DX 4 depicts Sullivan from a frontal view. Sullivan has a purple, sausage-shaped bruise under his right eye; along with swelling above and below the right eye area.

Sergeant Nelson Villafane

Villafane, an eleven-and-a-half-year member of the Department, is presently assigned to Group 54 of the Internal Affairs Bureau ("IAB") and was so assigned on June 24, 2006. He stated that on this date he investigated an incident involving an allegation of excessive force by the Respondent, specifically, the use of an ASP.²

Villafane stated that during his investigation, he interviewed two eyewitnesses, Edward Luciani and Tracy McGovern. He explained that the two are married and resided

¹ Omniform is the Department's computerized arrest and complaint system.

² An "ASP" is a metal, tubular baton which is capable of expanding and retracting.

in the vicinity of the incident that occurred involving the Respondent. During his interview of Luciani, Villafane stated:

... [H]e was at home, he heard [his] doorbell ringing. He then went to the window, observed some commotion outside, went downstairs and exited his residence, both he and his wife, and observed two officers and an unknown individual at the time kicking, punching and striking this individual on the ground.

Luciani further stated that he was about 20 feet away from the police officers when he exited his home and proceeded to walk toward them. He said that he observed a person that the police were attempting to subdue laying on the sidewalk "in a fetal position." Villafane said Luciani told him that he did not hear the police giving this person any commands and that they were "[p]unching and kicking him and striking him with a baton." Villafane stated that both officers were utilizing their batons on the individual, and that he was unable to tell if the person was handcuffed.

During Villafane's interview of McGovern, she informed him that she initially looked out the window, observed some commotion outside, called for her husband, and, once he came down, they both exited the residence. She observed the same thing, the unknown individual lying in a fetal position on the sidewalk and the two officers punching and kicking him and striking him with a baton. McGovern added that she did not hear any directives being issued by the police to the individual on the ground.

Villafane learned that Luciani and McGovern knew the individual who was on the ground, Daniel Sullivan, as they were neighbors. Neither one indicated that Sullivan used profanities toward the officers, spit at them or kicked them. There were also no indications during the interviews conducted by Villafane that Sullivan was flailing his arms or that he grabbed one of the officers by his crotch or waist. His investigation later

revealed that Sullivan was arrested and charged with resisting arrest and theft of service.

In reviewing the Arrest Report (DX 1), Villafane stated that the document reflected Officer William Kong as the arresting officer and that the charges were for obtaining transit without pay and resisting arrest. Villafane testified that the document read:

At TPO, Complainant states the defendant refused to pay the fair (*sic*) totaling \$38 for the yellow taxi ride to the defendant's residence.³ When defendant was told he was under arrest, the defendant attempted to run from arresting officer and when apprehended, the defendant prevented arresting officer from handcuffing him by swinging his arms and refusing to place arms behind his back.

The offenses that Sullivan was charged with were both A-level misdemeanors. DX 2, the Arrest Report associated with Sullivan's arrest contained a similar narrative to DX 1. In reviewing the two documents, Villafane testified that DX 1, the Arrest Report, indicated that a baton was used to subdue Sullivan.

Villafane stated that he learned that the disposition of Sullivan's criminal case was an Adjournment in Contemplation of Dismissal, on May 29, 2007. He never interviewed Sullivan, but learned what injuries he sustained and reviewed a worksheet prepared by another investigator. He said that the worksheet stated that Sullivan had "[contusions], bruises and a black eye, and a laceration just above the right eye, beneath his eyebrow, and a laceration behind his left ear, and numerous bruises and scratches on his body." Villafane also interviewed Johnathan Leavy, an Emergency Medical Technician who treated and transported Sullivan to the hospital after the incident. During this interview, Villafane had the Patient Care Report prepared by Leavy.

³ TPO= time and place of occurrence

During his investigation, Villafane reviewed a series of photographs. He testified that the photographs had been taken by Sergeant Tetonic and depicted Sullivan. In reviewing DX 3, Villafane stated that it reflected the right side of Sullivan's face and "the injuries to Mr. Sullivan, a laceration on the right side..." With respect to DX 4, he stated that it "indicates his injury, the contusion below his left eye and near his left eye and forehead." Upon inquiry by the Court, he said that the two photographs were dated June 24, 2006 at approximately 6:17 am.

Villafane testified that he was familiar with the Department's policy on the use of the ASP baton. He said that it is "utilized in various situations, utilized mainly on the green areas of the body⁴ ...the arms, the legs, the joints, the torso, if need be." When asked if it would be appropriate for a police officer to subdue a fleeing arrestee with the ASP, he said possibly. He stated that it was not recommended by the Department to be used on the head and he continued, "If the individual is exerting some physical force you can strike him wherever." He said that his investigation did not reveal that Sullivan used an excessive amount of force against the Respondent or Kong nor was there any finding that Sullivan possessed a weapon. The incident involving the Respondent and Sullivan occurred at about 1:50 am, and it was actively raining.

On cross-examination, Villafane acknowledged that Detective Bustos and Sergeant Tetonic interviewed Sullivan at about 6:18 am on June 24, 2006. He further acknowledged that he reviewed the worksheet and notes generated from this interview. He agreed that the interview took place about four hours after Sullivan's arrest and incident with the Respondent and that the detective conducting the interview was able to

⁴ Refers to a diagram used during ASP training that color codes areas of the body as green (safe target areas of the body for strikes) or red (areas where strikes can result in serious physical injury or death).

detect an odor of alcohol on Sullivan's breath. Sullivan did admit to consuming alcohol and claimed that he had four to five beers.

Villafane agreed that Sullivan made the allegation regarding the ASP from the onset. He testified that the Respondent and Kong were asked to surrender their ASP batons for a Hemident test at the crime lab. Villafane explained that this test checks for the presence of serological materials, namely, blood. He stated that this test will display a positive result if the tested object has blood on it. Both the Respondent's and Kong's ASP batons tested negative for the presence of blood.

Villafane stated that he "assumed so" that Sullivan sustained an injury where blood came out of his head. He also said that it was correct that Sullivan's allegation was that he received injuries from the police officers. He agreed that there was no blood on the two police officer's batons and that only a small amount of blood is needed to yield a positive result on the Hemident test.

With respect to the interviews that he conducted of Luciani and McGovern, Villafane stated that that they were tape-recorded. He agreed that this was done to ensure accuracy and for future production. Villafane said that details pertaining to what the two witnesses saw and heard were contained on the tape of the interview. He later brought this tape back to his office and prepared a worksheet, one for the Luciani interview and one for the McGovern interview. Villafane testified that it is the procedure of IAB that the worksheet is signed after it is prepared and he agreed that this signifies its accuracy. He agreed that three supervisors—Lieutenant Daniels, Captain Henig and Captain Keane also signed the worksheets and that this was a common practice. Villafane agreed that when signing a worksheet it is important to ensure the accuracy of the contents on it and

that it should reflect everything said in the interview that is pertinent to the case being investigated.

Villafane acknowledged that as he prepared the worksheets relating to the interviews, he was aware that Sullivan's allegation concerned the use of an ASP baton. He was then confronted with the fact that his worksheets were absent of the fact that Luciani and McGovern said that the Respondent punched, kicked and struck Sullivan with an ASP despite the fact that he testified to this on direct examination. Villafane stated, "...I was mistaken." He said that, "When I indicated about the ASP, later remembered what they stated during their interviews." He agreed that none of his worksheets relating to his interviews contain an allegation about an ASP, nor do the words, "ASP" or "baton" appear on either of the documents. He acknowledged that neither Luciani nor McGovern ever accused the Respondent of using an ASP baton.

Villafane offered that he confused the details of the aforementioned interviews with Sullivan's interview and realized this at a later point during the proceedings, specifically, during questioning by the Assistant Department Advocate. The Respondent's attorney asked Villafane if he would have mentioned this inaccuracy if he was not asked about it and he stated that he would have. He said that he did not want to interrupt the Assistant Department Advocate because, "I didn't know the procedure, I didn't want to interrupt. I was just testifying to what was indicated in the documents and so forth." Confronted with the fact that he previously testified that the Respondent used excessive force against Sullivan with an ASP and that two eyewitnesses confirmed this, combined with the fact that he did not point out that this was not an accurate statement until cross-examination, Villafane said that had the issue never come up, "I would have

mentioned it.” He also stated that he “absolutely” knew that the Respondent’s attorney would be cross-examining him with respect to this issue.

Villafane acknowledged that neither Luciani nor McGovern ever used the word ASP or baton during their interviews. Additionally, he agreed that the two never said they saw the man being struck with a baton or ASP.

During re-direct examination, Villafane said that neither Luciani nor McGovern ever said that they observed the entirety of the Sullivan altercation with the Respondent. He said that the two never said where Sullivan was when they exited their home, but did later say he was on the sidewalk.

Villafane testified that while he has observed the Hemident test “numerous times” he was unsure if any variables or factors such as rain would affect the outcome of the test. He stated, “[u]nless it’s contaminated for some other reason. Other than that, I couldn’t think of any [reason], no.”

Regarding the Respondent’s and Kong’s ASP batons that were seized and tested, Villafane was unsure if they had foam handles.

Johnathan Leavy

Leavy is presently employed as an Emergency Medical Technician (“EMT”) with the New York City Fire Department. He was volunteering as an EMT with the Whitestone Volunteer Ambulance Corps. on the evening of the incident.

He testified that on June 24, 2006, he was in his headquarters monitoring the EMS frequency and “heard a job come in” that was located less than a mile from where he was. He stated that the job was for a non-critical injury and that he responded to the location.

He said that his function on that evening was as an EMT and that another individual was operating the ambulance. He arrived on the scene and subsequently learned that the patient was Sullivan. He knew Sullivan and described him as "an acquaintance, nothing more than that. I know his brother is who I know better, his younger brother." He said that he never "hung out" with Sullivan.

Leavy testified that he performed an assessment of Sullivan. He said, "...I did a visual assessment looking at him and seeing what I could see right off the bat. And I asked him what had happened, what's going on, and he described to me what had happened, and I observed his injuries from that point forward." He "definitely suspected he was intoxicated" due to the odor of alcohol on Sullivan's breath, and his eyes being red and dilated. He recalled that Sullivan had a "lump over his right eye" and "contusions and abrasions on his knees." Leavy testified that Sullivan informed him that he was "going from bar to bar" in Manhattan and took a cab home but did not have enough money to pay and ran out of the cab and towards his home.

Leavy said that Sullivan told him "the police—Daniel told me that the police came and responded, I guess maybe the taxi driver called, and that the police ran up to him and he said that they threw him down to the ground and just started hitting him." He testified that Sullivan mentioned a club or ASP, informing him that "he was struck several times in the back of his legs, his knees, and he said something about being hit in his head." After being told this, he performed a physical evaluation of Sullivan where he looked for contusions, deformities, swelling, lacerations, checking for head trauma because he did have the hematoma on his head."

On inquiry by the Court, Leavy said that he knew an ASP to be “like a baton...the police officers carry them. It’s like a pole. Like a pole is the only way I can think of describing it ...”

Leavy said that he asked the police officers for their account of the incident. He said he “asked the first police officer I saw, you know, what had happened.” He identified the Respondent as the individual whom he asked, and that the Respondent replied with “a story that was similar, a little different... [h]e told me as he approached Daniel Sullivan and asked him to stop, Danny Sullivan took off and tried to get away from the police, and that, you know, upon going after him, it was wet out, they slipped on the floor, Daniel was resisting, and then he had to hit him.” He claimed that the Respondent informed him that he “might have hit him in the head.”

Leavy testified that he prepared a PCR after responding to the assignment involving Sullivan. Leavy recognized DX 5 as the PCR that he prepared as it bore his shield number and handwriting and he had a recollection of completing the document. He testified in the “comments” section of this form he recorded a statement made by the Respondent as, “I wrote patient was hit in the head by PD with a club as admitted by PD.” He stated that the shield number on the form belonged to the Respondent’s partner, who rode in the ambulance. Leavy explained that he did not want the Respondent to ride in the ambulance because he wanted to keep Sullivan calm. He said that he wrote the statement about the club on the PCR just in case “my patient had (sic) health-wise went downhill in any way shape or form...” He further stated that he blackened a circle on the form indicating substance abuse due to Sullivan’s apparent intoxication and also designated him “potentially unstable.”

On cross-examination, Leavy said that Sullivan told him he ran away from the cab because he had no money to pay the fare. Sullivan denied that he resisted arrest. He testified that Sullivan's clothing was "very, very wet" and remarked that he defecated on himself. In response to, "[Sullivan] was without question intoxicated in your opinion, correct?" Leavy replied, "In my medical opinion, yes."

Leavy recalled that he had an interview with members of IAB. He acknowledged that he told them that he was an acquaintance of Sullivan and knew that he liked to drink alcoholic beverages frequently. When asked to explain how he knew this, he said, "Well, any time that I have seen Daniel Sullivan, it would mostly be at like a bar maybe, or a concert, or something like that. It was really the only places I ever really used to see him." He said that he has known Sullivan's brother, Tim, since he was 15 years old, and he is now 28. Leavy recalled the officers at the scene informing him that "Sullivan was not listening to their orders, and he, you know, physically proceeded, and when they grabbed him to stop him, he turned around and was very resistant towards the police officers."

Leavy said that the officers told him that in subduing Sullivan, he landed face first on the ground. He stated that the Respondent said that he struck Sullivan in the legs with an ASP and that he remarked that he might have hit him in the head. Leavy agreed that it was possible that the Respondent's statement to him was that in the process of subduing Sullivan, he [Sullivan] may have hit his head.

With respect to the interview of Leavy by members of IAB, he recalled saying that he observed the Respondent and Sullivan having a "very angry" dialogue in the

Giachetti near him. And you know, just the police officer expressing his feelings.”

Regarding the PCR document that he prepared, Leavy agreed that despite the document reading that the police admitted to striking Sullivan in his head, it is possible this is not accurate. He explained:

...I have been working on ambulances for five years now. I haven't been EMT the whole time, but I have three years as an EMT. I now work in the 911 system. It's a very busy area. I fill out thousands of reports a month, and it's very hard for me to remember every single job that I have done...

Leavy did not recall a clear admission from the Respondent at the scene that he struck Sullivan in the head.

On re-direct examination, Leavy acknowledged that the PCR document is filled out contemporaneously with the event. He said, “I start it as soon as I get in the ambulance I start my PCR's.”

Upon inquiry from the Court, Leavy said the injuries on Sullivan's face appeared fresh. He was asked to give a description:

He had swelling over the right eye, sort of like egg shaped swelling over the right eye and a lot of discoloration under the eye. That was it for his face. Then he just had some abrasions and marks on the back of his—the back and front of his knees.

He indicated that Sullivan was wearing long pants and that he “absolutely” pulled them up to see his knees. He then said he was not sure if he was wearing long pants or shorts, but that he did see his knees. He testified that there were abrasions and some red marks on his legs.

The Respondent's Case

The Respondent called Sergeant William Kong and testified in his own behalf.

Sergeant William Kong

Kong has been a member of the Department for over seven years. He is currently a patrol sergeant in the 70 Precinct and was promoted to that rank in June 2007. In June of 2006, he was a police officer in the 109 Precinct. He stated that he has made over 80 arrests.

On June 24, 2006, Kong testified that he was working with the Respondent in a marked RMP⁵. He explained that he and the Respondent were assigned a 911 call of a dispute at an intersection. Upon arrival at the location, they observed a taxi on the corner and were beckoned over by the driver. He noticed that a person, Sullivan, was “passed out in the back seat” of the cab and the driver said “...he brought him from Manhattan to this intersection that he told him to bring him to, and he refused to pay at that point.” Kong explained that he and the Respondent spent about five minutes attempting to wake Sullivan up. He said he was “very intoxicated” and noticed a “smell of alcohol...we noticed he defecated on himself, and he was just—his eyes were red...his speech was slurred.”

Kong testified that Sullivan got out of the cab and they asked him to pay the fare for the cab ride. For about ten minutes, Sullivan proceeded to take his wallet in and out of his pocket continuously all while slurring his words and mumbling. After repeated attempts to get Sullivan to pay the fare, Kong and the Respondent elected to place him under arrest. He said, “We went to get him [Sullivan], and he pushed through us and ran

⁵ Patrol car

down the block...he ran right through us, the middle of us, and pushed through us.”

Kong explained that he and the Respondent were facing Sullivan, who ran directly through the middle of them.

The two officers proceeded to run after Sullivan, while giving verbal commands for him to stop. He refused these orders and kept running, stopping at a house and banging on the door while ringing the doorbell. Kong testified that Sullivan then turned around and ran at him and the Respondent at a high rate of speed. Both officers removed their ASP batons and struck Sullivan about the legs as instructed at the Police Academy. The baton strikes had no effect and Sullivan proceeded to run past the officers and to another house. The officers proceeded after Sullivan and attempted to grab control of him but were unable to do so because “he is just pulling away and his hands are wet because it is raining still.” Eventually, Kong said, they were able to subdue Sullivan by “...bring[ing] him down to the ground to get control of him.” This occurred on the ground, on a concrete surface. Sullivan went down “hard...face first.”

After subduing Sullivan on the ground, Kong said he and the Respondent each had hold of one of Sullivan’s hands. He said, “He was resisting, swinging his arms. He refused to place his arms behind his back, so we had to fight with him pretty much to get his arms in the handcuffs.” Eventually Sullivan was handcuffed. Kong said Sullivan was not struck with the ASP again subsequent to being struck after running at him and the Respondent from the first house that he stopped at. He said that he replaced his ASP back on his belt after initially striking Sullivan on the legs because he needed his hands free.

Upon handcuffing Sullivan, he was assisted from the ground in standing up. Kong testified that "He was more cooperative then because his hands were in cuffs. I am assuming he was tired at this point." He could not recall him saying anything but noted that he had a cut on his forehead. Sullivan was walked over to the RMP and an ambulance was summoned for him. Sullivan was transported to the hospital via the ambulance. Kong did not recall any statements made by Sullivan in the ambulance or the hospital. He said that he never hit him in the head with an ASP, and never observed the Respondent strike him above the waist or in the head, either. Furthermore, he did not strike Sullivan in the head with anything.

During cross-examination, Kong acknowledged that he was the arresting officer of Sullivan and that he prepared all of the relevant paperwork and reports associated with the arrest. He explained that as opposed to going to the District Attorney's office to "swear out" the criminal complaint, the process is completed via telephone. He said that the complaint is done on "ICAPS."⁶ We type it on the computer and it goes to the District Attorney. She reads it and faxes it back. We don't actually go in." He admitted to speaking with the Respondent before completing ICAPS and conferring with him regarding the charges against Sullivan. The two decided on charging Sullivan with resisting arrest and theft of service.

Kong did not recall Sullivan grabbing the Respondent by the waist in an effort to bring him to the ground, nor did he recall Sullivan attempting to grab the Respondent's baton. He did recall being told by the Respondent that Sullivan grabbed his groin area and spit at him. He did not see this happen because he was not "looking above," he was

⁶ Interactive Case Affidavit Preparation System, a computer system used in Queens by the Queens County District Attorney's office for completing and transmitting criminal court affidavits and complaints.

concentrating on controlling Sullivan's hands. Kong acknowledged that during the scuffle with Sullivan, the Respondent's 9-millimeter magazine holder affixed to his belt was ripped off. He testified that he was sure that the holder was vouchered, but he was not sure if he was the one who typed the voucher.

Before testifying, Kong reviewed his Activity Log entries pertaining to Sullivan's arrest. He acknowledged that there were no entries about a fight or spitting that occurred, and that all his log states is: "one under at 0159 hours." The 61⁷ was never amended to reflect additional charges. Kong was questioned regarding the time period it took to subdue Sullivan. He said, "I am not sure of the time, but it took a while...it was more than a minute." He agreed that while the Respondent is a "big guy," it did take both officers to subdue Sullivan. He recalled Sullivan to be 5'10" and about 220 pounds. He stated that they did not use their ASPs under Sullivan's arms to gain leverage.

During re-direct examination, Kong testified that his current duties as a sergeant include reviewing police officer's memo books. He said that he is not aware of any requirements dictating that all details pertaining to an arrest must be written in a memo book. In response to the Court's inquiry, he said that "some guys do" include all details, "but not everybody" and that "it varies by officer, but I think most people just put 'one under'."

Kong was further questioned by the Court regarding the location of the incident. He said that it was less than a block from where they encountered Sullivan at the taxi to where he was stopped. He said that when he pulled out his ASP and struck Sullivan, it was at a house with a small landing, comprised of a small staircase which leads up to the front door. He said that he and the Respondent were able to subdue Sullivan by grabbing

⁷ UF-61, a complaint report.

him and “bringing him down to the ground while he was running forward, which is why he went down face first.” Kong said that he is 5’8” tall and weighs 150 pounds.

During further cross-examination, Kong acknowledged that it “may be” prudent to document encountering a combative individual who becomes injured in a memo book but that it is not required.

Police Officer Darrin Giachetti

The Respondent has been a member of this Department for 17 years. Prior to his assignment at the 109 Precinct, he worked at Police Service Area No. 7 in the South Bronx for eight to nine years. He has been assigned to patrol duties for his entire career and that he has made “over a hundred” arrests.

The Respondent testified that on June 24, 2006, he responded to an incident involving Sullivan at about 1:00 am. He said that at around 147 Street and Fifth Avenue, he was summoned by a taxi driver who reported Sullivan was passed out in the back seat. Upon opening the door to the taxi, “[Sullivan] was sleeping in the back seat. And the odor of human feces just exited the vehicle.” After about five minutes of attempting to wake him up, Sullivan was asked to exit the taxi. The Respondent noted that Sullivan was “very intoxicated” and had a “smell of alcohol on his breath, red eyes, he couldn’t speak very clear, slurring every word, he couldn’t stand up straight, swaying back and forth.”

Sullivan was asked to pay the fare. He proceeded to take his wallet out of his pocket and then put it back in his pocket several times. The Respondent said that Sullivan would not have been arrested had he paid the fare. Ultimately, he was told one

more time of his obligation to pay the fare or else he would be subject to arrest. Sullivan did not pay, and the Respondent explained that he and Kong decided to make an arrest. He detailed what transpired, stating, "...we both went to grab his arms, and that's when Mr. Sullivan pushed right through me, pushed through Officer Kong, and ran down the block". The two officers proceeded after him for a distance of about three quarters of a block, while ordering him to stop. Sullivan refused these orders.

The Respondent testified that Sullivan ran up onto the stoop of a house and started "banging on their door." As he approached Sullivan, he had already removed his ASP. Sullivan then turned around and "lunges right at us. Pushed me aside again." The two officers pursued Sullivan again, across a lawn and to the front door of another house while striking him about the legs with their ASP batons to no avail. As the Respondent chased after Sullivan, he was behind him and struck "his shin and his calf and the back of his leg" with the baton. He said that he never struck him above his waist or in the head. At one point, near the second house, the Respondent stated that his ASP fell out of his hand due to the rain and landed on the ground. The Respondent and Kong then tackled Sullivan to the ground, where he tried to grab the Respondent's ASP. The Respondent was able to secure his ASP on his belt, and stated that Sullivan got to his knees and lunged at him.

Regarding the process of subduing Sullivan, the Respondent testified that he [Sullivan] was "on all fours" and on his knees. The officers were attempting to "pull his arms out away from him so we can bring them behind his back and cuff him," however, Sullivan resisted by kicking the two officers. Eventually, Kong was able to handcuff his

left arm. While the Respondent was trying to handcuff the right arm, Sullivan grabbed him in the groin.

In order to subdue Sullivan, the Respondent used his body weight on top of him and lay on his back. On the date of the incident, the Respondent weighed 230-240 pounds. He disagreed with Kong's description of Sullivan at 5'10" to 5'11" and 225 pounds, claiming that he thought he was bigger. He testified that Sullivan was "very strong." Eventually he was brought to the ground from his initial position of being "on all fours" as a result of the Respondent using his knee on Sullivan's shoulder. He was then handcuffed. Asked to characterize Sullivan's demeanor, the Respondent replied, "Very vicious."

Upon being handcuffed, Sullivan was stood up from the ground. He spit on the Respondent on the way to the police car. He was very angry and cursing. The Respondent took notice that Sullivan had blood on his face and a bruise on his forehead. An ambulance was summoned to the scene and Sullivan was transported to the hospital.

The Respondent testified that he has dealt with individuals resisting arrest before. He has assisted other police officers in subduing individuals resisting arrest. Prior to this incident, he never had the opportunity to use his ASP, as he explained he had just been trained in it "six months before this incident happened."

At the hospital, Sullivan apologized to the Respondent for his conduct.

On cross-examination, the Respondent acknowledged that it was raining on the night that he encountered Sullivan. He said he had no idea that he would be involved in a foot pursuit. He agreed that he was out of breath after the foot chase and that he and Kong had been running for a while.

The Respondent acknowledged that he and Kong took Sullivan to the ground. He was already aware that Sullivan had defecated on himself, and the three were wet from rolling on the ground. The Respondent said that he was telling Sullivan to stop during the entire incident. Sullivan charged at him and Kong as soon as he "resisted arrest" by pushing away at the taxicab. After ringing the door bell at the first house, Sullivan jumped off the stoop and pushed through the officers. They proceeded to strike him with the ASP in the legs as he ran to the second house. In pushing through the two officers, he charged through the middle of the Respondent and Kong.

The Respondent said that he did not strike Sullivan as he jumped off the stoop of the first house. He said that his ASP contacted him as he was going from the first house to the second house. Upon tackling him to the ground, Sullivan grabbed the Respondent about the waist in an attempt to overpower him. The Respondent stated that his ASP had fallen out of his hand and was on the ground at one point.

The Respondent was questioned regarding the training he received on the ASP baton. He indicated that according to the training, it would not be proper to strike someone in the head with the baton. He said that an exception to this would be if a person was using deadly physical force, but stated he never hit Sullivan in the head with his ASP.

Before testifying, the Respondent said that he reviewed his memo book. He said that it reflected "one under" at 1:59 am, but that it did not say that he encountered a violent individual who resisted arrest. Nor did the memo book contain an entry indicating that the individual sustained injuries or that the Respondent's property had been damaged.

The Respondent said that he was not injured in the altercation with Sullivan, but he thinks that he may have sustained a cut on his finger. He did not seek a line of duty injury designation for the cut, nor did he document it. He acknowledged that Sullivan was bleeding, but stated that he did not complete an exposure form.

Upon questioning by the Court, the Respondent testified that he thinks his magazine pouch was ripped from his belt when Sullivan was grabbing him from the waist. He did not notice that it was ripped until he got into the patrol car and the magazine fell off of his belt. The Respondent said the magazine pouch was made of leather, likening it to be similar to a gun holster. When asked about the position that Sullivan was in, subsequent to being handcuffed, the Respondent said, "His hands and arms were behind his back, face was on the ground on the concrete...legs were just straight out." At no point did he see him curled up in any position during the incident.

FINDINGS AND ANALYSIS

The Respondent is charged in one specification with using excessive force by repeatedly striking an individual about the body and/or head without just cause. The central question, therefore, is: has it been established by a preponderance of the credible evidence that the Respondent did, in fact, use excessive force against Daniel Sullivan?

It is uncontroverted that Sullivan took a taxicab from Manhattan to an intersection near his residence in Queens. It was established that he was extremely inebriated, so much so to the extent that he defecated on himself, passed out in the back of the taxicab and ultimately could not pay the fare that he had incurred. The Respondent and his partner arrived in response to the taxicab driver's request and, according to their

testimony, were met by a hostile and combative Sullivan who would not pay the fare, lead the officers on a foot chase, refused to comply with their orders and violently resisted arrest.

Despite the Department Advocate's efforts to obtain Sullivan's appearance, he chose not to appear. The non-appearance of the complainant here demonstrates that he was not interested in participating in this proceeding or giving testimony under oath. His allegations are not subject to cross-examination and this Court is unable to examine his trial demeanor or explore any potential biases. Similarly, two alleged eyewitnesses, Luciani and McGovern also were not interested in appearing. Therefore, the allegation here rests solely on the hearsay statements introduced through the testimony of Villafane of the Internal Affairs Bureau and Leavy, the Emergency Medical Technician.

It is well-established that hearsay statements are admissible in an administrative tribunal. It has been held that "the only limit to the admissibility of hearsay evidence is that it bear satisfactory indicia of reliability...that the hearsay be probative and its use fundamentally fair." See *Calhoun v. Bailar*, 626 F.2d 145, 148 (9th Cir. 1980), cert. denied, 452 U.S. 906, 101 S.Ct. 3033, 69 L.Ed.2d 407 (1981). Accordingly, an analysis must be conducted of the hearsay testimony here to ascertain its reliability.

On direct examination, Villafane testified that he interviewed two eyewitnesses to the incident, Luciani and McGovern, who coincidentally happened to be neighbors of Sullivan. It was his testimony that both individuals told him during their interviews that they observed the officers "[p]unching and kicking him [Sullivan] and striking him with a baton." Villafane was later questioned by the Respondent's attorney on cross-examination with the fact that none of his investigative worksheets reflected that Luciani

or McGovern stated that the Respondent used a baton or ASP on Sullivan. It was at this point that he recanted his prior testimony, saying, "I was mistaken... [w]hen I indicated about the ASP, I later remembered what they stated during their interviews." Villafane claimed to have confused the substance of the Luciani and McGovern interviews with the interview of the complainant, Sullivan. He claimed to realize his error while he was still being questioned by the Assistant Department Advocate on direct examination, offering as an explanation that "I didn't know the procedure, I didn't want to interrupt. I was just testifying to what was indicated in the documents and so forth." This is both alarming and troubling that a witness would realize he gave false testimony and would not correct the error while testifying. This significantly diminishes the weight that can be afforded to the testimony that he offered to this Court. His explanation that he confused the Luciani and McGovern interviews with that of Sullivan is incredible. This is so because his own testimony established that he never conducted an interview of Sullivan. Additionally, the fact that he said that he was "just testifying to what was indicated in the documents and so forth" is similarly not credible. Had he, in fact, testified to "what was contained in the documents" it is likely that this discrepancy would not have transpired.

Villafane further compounded his error when he informed the Respondent's attorney during cross-examination that he "absolutely" knew that he would be cross-examined about his statements regarding the interviews. He was then asked if he would have brought the issue up had he not been cross-examined on it and excused as a witness from the stand. He said, "I would have mentioned it, yes." Unfortunately, this is not believable. Neither Luciani nor McGovern appeared before this Court. Despite the fact that Villafane said that he recorded their interviews, the tapes were not offered into

evidence. This coupled with Villafane's significant misstatement on direct examination and lack of a reasonable explanation for it leaves no alternative but to dismiss the entirety of the hearsay testimony that Villfane introduced as lacking reliability and credibility.

Leavy, the Emergency Medical Technician who treated and transported Sullivan to the hospital testified as to his observations and offered statements that were apparently made by both Sullivan and the Respondent. In gauging the reliability of the statements provided by Leavy, a similar analysis should be conducted. Leavy admitted to being just an acquaintance of Sullivan. However, Leavy seemed to know Sullivan well enough to the extent that he knew that he had an affinity for alcoholic beverages. He said that he knew this because anytime he saw him he was either in a bar or at a concert.

To the extent that Leavy offered that it was his opinion and observation of Sullivan that he was inebriated, I credit this portion of his testimony. As Leavy testified before this Court, he made no mention of a baton or an ASP until he was questioned about the PCR he prepared, DX 5. In fact, he initially only testified that the Respondent told him that he "might have hit [Sullivan] in the head." At a later time, he claimed that the Respondent told him that he hit Sullivan in the head with a club and documented it on the PCR as, "I wrote patient was hit in the head by PD with a club as admitted by PD." I find it suspect that Leavy did not make mention of this fact when he was initially questioned about what the Respondent told him at the scene, but then later recalled it when he was shown his PCR document. Perhaps even more bizarre was Leavy's characterization of a baton as a "club," terminology which seems to be more fitting for the Middle Ages than a description used by a police officer to describe his own ASP.

Indeed, he claimed to know what an ASP was and even described it accurately in response to the Court's questioning.

On cross-examination, Leavy agreed that it was possible that the Respondent informed him that Sullivan may have hit his head while the Respondent and Kong attempted to subdue him on the ground. He also had no recollection of a police officer making a clear admission of hitting Sullivan in the head. I find it unlikely that the Respondent made a statement at the scene to Leavy that he "clubbed" Sullivan on his head.

While more credible than Villafane, it is problematic to assign significant weight to the hearsay statements supplied by Leavy. It is difficult to overcome the fact that he obviously had a personal relationship with Sullivan's brother and possibly Sullivan. Further, there were inconsistencies as his testimony unfolded, especially concerning his renditions of what the Respondent may or may not have said to him at the scene despite the fact that his PCR report claimed an admission by the Respondent.

I found the testimony offered by the Respondent and Kong to be credible. Responding to a report of a male refusing to pay his cab fare, the two officers were met by a heavily intoxicated Sullivan. It took a considerable amount of time to rouse Sullivan, after which the Respondent and his partner made numerous efforts to attempt to get him to pay his cab fare. Sullivan was so intoxicated that he could not even follow this simple instruction, instead, taking his wallet in and out of his pocket repeatedly. The Respondent and Kong made a decision to place Sullivan under arrest.

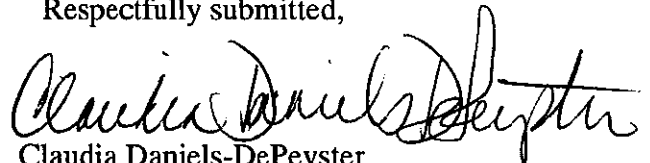
Both officers testified that their efforts to arrest Sullivan were met by violent resistance. He charged through the center of them on two separate occasions and led

them on a short foot pursuit, in the process of which he stopped to pound on the front doors of two separate residences. Eventually, the Respondent and his partner were able to subdue Sullivan on the ground, on a concrete surface. According to the Respondent, in the process of subduing Sullivan, he kicked at the officers, spit on the Respondent and, at one point, grabbed the Respondent about the waist ripping the magazine pouch from his belt.

It is not in dispute that both the Respondent and Kong used ASP batons in an attempt to subdue Sullivan. The Department seems to assert that the Respondent used his baton on Sullivan's head and/or face, an accusation that the Respondent consistently denied at trial. Further, in examining the two photographs of Sullivan (DX 3-4), it is not apparent that the injuries on his face were caused by an ASP baton. This is especially important where the Hemident blood test conducted on the Respondent's and Kong's ASP batons tested negative. It is quite conceivable that the injuries depicted on the pictures could well have been caused as a result of Sullivan's face coming in contact with the concrete as he resisted arrest.

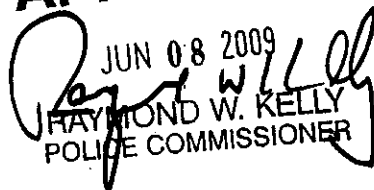
Based upon the foregoing, the Department has failed to establish the charge before this Court by a preponderance of the credible evidence. Accordingly, I find the Respondent Not Guilty.

Respectfully submitted,



Claudia Daniels-DePeyster
Assistant Deputy Commissioner – Trials

APPROVED



JUN 08 2009
RAYMOND W. KELLY
POLICE COMMISSIONER